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10 UNITED STATES DISTRICT COURT
11 DISTRICT OF ARIZONA

12 STATE OF ARIZONA, DEPARTMENT
13 OF LAW, CIVIL RIGHTS DIVISION, and
ANGELA AGUILAR,

14 Plaintiffs,

15 vs.

16 ASARCO, LLC, a Delaware limited liability
17 company,

18 Defendant.
19
20

Case No.: CV 08-441 TUC-MWB

**PLAINTIFF AGUILAR'S MOTION
IN LIMINE TO EXCLUDE:**

1. **EVIDENCE OF PRIOR
EMPLOYMENT INCLUDING
JOB PERFORMANCE**
2. **ARIZONA DES
DETERMINATION**
3. **REFERENCE TO DISMISSED
CLAIM**

21 Intervenor-Plaintiff Angela Aguilar, by and through her undersigned counsel,
22 hereby moves to exclude evidence and testimony on certain topics at the trial of this matter,
23 to wit:

- 24 1. Plaintiff Aguilar's pre-ASARCO employment, including her job performance;
- 25 2. The Determination of the Arizona Department of Economic Security ("DES"),
26 dated December 21, 2006, identified as part of Exhibit 96, ASARCO00120 in the
27 Joint Proposed Pretrial Order (Dkt. 261); and
28

1 3. Any reference to Aguilar's claim of intentional infliction of emotional distress,
2 which was dismissed.

3 This Motion is supported by the following Memorandum of Points and Authorities, the
4 exhibits attached hereto, and matters of record in this case.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. Introduction.**

7 Based upon portions of the Joint Proposed Pretrial Order entered on July 30, 2010
8 (Dkt. 261), it appears Defendant intends to introduce certain items of evidence, whether
9 testimony or documents, which Plaintiff Aguilar believes are not admissible at trial. As to
10 each of these matters, Aguilar provides some factual background and then the reason or
11 reasons why the Court should exclude the evidence.

12 **II. Plaintiff's Prior Job History and Performance Is Not Relevant to**
13 **Any of The Issues in this Litigation, and as to the Performance**
14 **Evidence Especially, It Is Improper Character Evidence and**
15 **Replete with Hearsay Upon Hearsay.**

16 Fed. R. Evid. 402 provides, in pertinent part, that "evidence which is not relevant is
17 not admissible." Under Fed. R. Evid. 403, even if evidence is relevant, it "may be
18 excluded if its probative value is substantially outweighed by the danger of unfair
19 prejudice, confusion of the issues, or misleading the jury, or by considerations of undue
20 delay, waste of time, or needless presentation of cumulative evidence."

21 Defendant ASARCO's Exhibit 129 in the Joint Proposed Pretrial Order (Dkt. 261)
22 is comprised of a portion of Aguilar's employment records from 2004, when Aguilar was
23 working at Fleet Boston. (See Exhibit 1, ASARCO 1992-2000, 2051-2058.) Aguilar's
24 Fleet Boston employment ended in 2004, and Aguilar subsequently became employed by
25 Defendant ASARCO in late 2005. The excerpts which have been selected by Defendant are
26 designed to portray Aguilar as someone who was having performance issues at work and

1 perhaps personality conflicts with co-employees.¹ (Defendant has conveniently omitted
2 Fleet Boston records which show a three-year history of satisfactory performance before
3 any issues arose.) These records are simply not relevant to Aguilar's claims for sex
4 discrimination and harassment, and retaliation, under the Civil Rights Act of 1964, as
5 amended, 42 U.S.C. §§2000e *et seq.* ("Title VII) or the Arizona Civil Rights Act, A.R.S.
6 §§41-1461 *et seq.* ("ACRA"). Nor are they relevant to her claims for compensatory
7 damages or equitable relief.

8 The only reasons Defendant seeks to have this, and similar, evidence introduced is
9 to support it's expert's opinion concerning Aguilar's purported "personality trait" and to
10 argue that Aguilar acted "in conformity" with her conduct at Fleet Boston when she had
11 alleged "personality" issues with ASARCO employees Wayne Johnson, Julio Esquivel and
12 others. Under Fed. R. Evid. 404(a), "[e]vidence of a person's character or a trait of
13 character is not admissible for the purpose of proving that [the person] acted in conformity
14 therewith on a particular occasion," except in certain circumstances not applicable here. In
15 addition, evidence of prior acts cannot be introduced to prove the character of a person in
16 order to show that she acted in conformity therewith. Fed.R.Evid. 404(b). These principles
17 apply here.

18 In *Neuren v. Adduci, Mastriani, Meeks & Schill*, the trial court had admitted
19 evidence from an earlier employment to show conduct in conformity at the subject
20 employer, and the court of appeals pointed out this use was specifically *prohibited* by Rule
21 404. 43 F.3d 1507, 1511 (D.C. Cir. 1995). Similarly, evidence of prior employment is
22 inadmissible under Fed. R. Evid. 403 to show a propensity for deficient performance. *See*
23 *e.g., Zubulake v. UBS Warburg LLC*, 382 F. Supp. 2d 536, 543 (S.D.N.Y. 2005). It is also
24 inadmissible under Rule 404(a) to show work performance with other employers before

25 ¹ This is some of the material Defendant's expert Dr. Pitt relied upon in reaching an
26 opinion about Aguilar. Aguilar has moved to exclude Dr. Pitt's testimony by motion also
filed today.

1 and after the subject employment. *See EEOC v. Serramonte*, 237 F.R.D.220, 234 (N.D.
2 Cal. 2006).

3 The other problem with the Fleet Boston material is the hearsay nature of much of
4 the material. The document is clearly offered for the truth of the matters stated and so falls
5 within Fed. R. Evid. 801(c). As hearsay, it is inadmissible under Fed. R. Evid. 802 unless
6 some exception applies. With regard to much of the specific material proposed as Trial
7 Exhibit 129, we do not know who the author is, and, indeed, it appears from the material
8 that there may have been multiple authors. It is also replete with hearsay upon hearsay,
9 with the writer or writers referring to statements made by persons other than Aguilar. The
10 exhibit should be excluded on this basis also.

11 **III. By Arizona Statute, The Determination of The Department of 12 Economic Security is Inadmissible.**

13 A.R.S. §23-672.01 provides:

14 Any finding of fact or law, judgment, conclusion or final order made by a
15 hearing officer, an administrative law judge or any person with the authority
16 to make findings of fact or law in any action or proceeding before the
17 department or the appeals board pursuant to this chapter is not conclusive or
18 binding in any separate or subsequent action or proceeding and shall not be
19 used as evidence in any separate or subsequent action or proceeding between
20 an individual and the individual's present or former employer brought before
21 an arbitrator, court or judge of this state or the United States, regardless of
22 whether the prior action or proceeding was between the same or related
23 parties or involved the same facts.

24 Defendant has identified as part of Exhibit 96 in the Joint Proposed Pretrial
25 Order a Determination of Deputy. (See Exhibit 2, ASARCO00120.) That
26 Determination is inadmissible under the statute.

27 **IV. Defendant Should be Prohibited From Referring to the 28 Dismissed Claim for Intentional Infliction of Emotional Distress.**

29 It is unknown at present whether Defendant has any intention of referring in
30 any way during trial to the fact that Aguilar has dismissed her claim for intentional
31 infliction of emotional distress, but in an abundance of caution Aguilar requests that

1 the Court prohibit any mention of the dismissed claim. Whether or not any claims or
2 defenses have been dismissed or dropped by any party is not relevant to any of the
3 remaining issues in the case. Reference to a claim that was dismissed may, however,
4 confuse the jury and unduly prejudice Aguilar because the jury may believe it was
5 dropped because there was some weakness or deficiency in Aguilar's case. The
6 information should be excluded from trial under Fed R. Evid. 403.

7 **V. Conclusion.**

8 Plaintiff Angela Aguilar respectfully requests that the Court exclude from the trial
9 (1) any records or evidence of Aguilar's prior employment, and in particular the Fleet
10 Boston records identified as a defense exhibit, (2) the Determination of Deputy of the
11 Arizona Department of Economic Security, and (3) any reference to Aguilar's dismissed
12 claim for intentional infliction of emotional distress.

13 RESPECTFULLY SUBMITTED this 18th day of February, 2011.

14 WATERFALL ECONOMIDIS CALDWELL
15 HANSHAW & VILLAMANA, P.C.

16 By s. Jenne S. Forbes
17 Jenne S. Forbes
Attorneys for Plaintiff

18 I hereby certify that on February 18, 2011, I electronically transmitted the attached
19 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a
20 Notice of Electronic Filing to the following CM/ECF registrants:

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